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# State v. Rodriguez Appellant's Reply Brief Dckt. 42808

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 42808
	)	
v.	)	CANYON COUNTY NO. CR 2013-
	)	28840
	)	
MARGARITO RODRIGUEZ,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

HONORABLE CHRISTOPHER S NYE  
District Judge

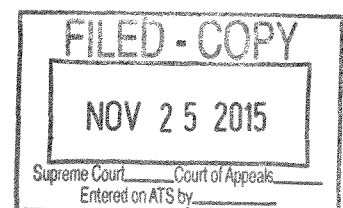
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## STATEMENT OF THE CASE

### Nature of the Case

Margarito Rodriguez timely appeals following his conviction for two separate counts of Sexual Abuse of Y.R. and S.T., after the district court allowed the prosecutor to proffer unsworn testimony at trial that was inconsistent with the witness' direct examination testimony.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Rodriguez's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

## ISSUES

1. Did the district court err when it allowed the prosecutor to testify during direct examination in violation of Mr. Rodriguez's due process rights and right to a fair trial?
2. Did the district court err when it allowed the prosecutor to testify without allowing Mr. Rodriguez to cross examine her thereby violating Mr. Rodriguez's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution?
3. Did the district court err when it allowed the prosecutor to engage in misconduct by offering facts not in evidence by allowing the detective to give his opinion about what he saw on the video, State's Exhibit #19, to the jury?
4. Did the district court err when it improperly commented on the evidence by admonishing the jury to only consider the video and the narrative for the charge against Mr. Rodriguez involving S.T., thereby violating Mr. Rodriguez's right to a fair trial before an impartial jury?

## ARGUMENT

### I.

#### The District Court Erred When It Allowed The Prosecutor To Testify During Direct Examination In Violation Of Mr. Rodriguez's Right To Due Process And Right To A Fair Trial

##### A. Introduction

The district court erred when it allowed the prosecutor to testify, resulting in inadmissible, unsworn testimony presented to a jury. This violated Mr. Rodriguez's rights to due process and a fair trial.

##### B. The District Court's Error Violated Mr. Rodriguez's Due Process And Right To A Fair Trial Which Resulted In Fundamental Error

Mr. Rodriguez incorporates his argument in Section I of his Appellant's Brief and will not repeat those arguments here (Appellant's Brief, pp.5-16), but will directly address the claims made in the State's Response regarding the unsworn testimony of the prosecutor. The State alleges that admission of Ms. Kallin's question to S.T. does not rise to the level of fundamental error because it didn't violate Mr. Rodriguez's constitutional rights. (Respondent's Brief, pp.5-14.) In doing so, the State tries to eliminate the prejudicial effect of Ms. Kallin's question by rephrasing it as "Do you remember us talking about that?" (Respondent's Brief, p.6.) Further, it defines Ms. Kallin's inadmissible testimony "And do you remember when you were talking to me, I asked you about any time that you had seen your father masturbate and you indicated you remembered one time..." as setting "forth the factual premise of the question." (*Id.* at 7.) Regardless of the form in which the information was conveyed to the jury, "a prosecutor must 'guard against anything that would prejudice the minds of



the jurors, and tend to hinder them from considering only the evidence introduced.”  
*State v. Severson*, 147 Idaho 694, 715 (2008) (quoting *State v. Irwin*, 9 Idaho 35, 43-44 (1903)). The introduction of Ms. Kallin’s testimony prejudiced the minds of the jurors and hindered them from considering only the evidence introduced.

C. Ms. Kallin’s Unsworn Testimony Violated Rule 3.7 Of The Idaho Rule Of Professional Conduct (I.R.C.P.) Which Prohibits Attorneys From Testifying In A Case In Which The Attorney Is Involved

The State argues Mr. Rodriguez’s reliance on I.R.C.P 3.7 is misplaced. First, it argues because the rule has no constitutional significance, it is irrelevant. (Respondent’s Brief, p.8.) This argument does not take into account the basis for I.R.C.P. 3.7, which is grounded in constitutional protections. The commentary to I.R.P.C. 3.7 states “the tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness.” This safeguard ensures there is no blurring of the line between the role of attorney and witness in the eyes of the jury. The commentary further delineates between witness and advocate, stating “[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.” Further, the rule assumes that without such a rule, “it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.” Here, the prosecutor’s unsworn testimony was based on her own personal knowledge, i.e., a conversation she had with S.T. She was not acting as an advocate when she explained and commented on S.T.’s testimony, that she never saw her father masturbate. Contrary to the State’s claim, this distinction is relevant because Mr. Rodriguez’s due

process rights and his right to a fair and impartial jury were violated when the prosecutor was allowed to provide unsworn testimony, not subject to cross examination, to the jury.

The State's argument also ignores *State v. Aguilar*, 135 Idaho 894 (Ct. App. 2001). The issue in *Aguilar* was whether the prosecutor's inducement of a witness to participate in a sting operation in exchange for a reduction of pending charges, made the prosecuting attorney a necessary witness for the defense. The defendant alleged the prosecutor violated I.R.C.P. 3.7 by testifying in a case where the prosecutor represented one of the parties. The defendant challenged the district court's determination that the prosecuting attorney not be disqualified from representing the State in its prosecution of him. *Id.* at 895. The Court of Appeals acknowledged no Idaho appellate court has directly addressed the circumstances under which a defendant should be allowed to call the prosecuting attorney as a witness. *Id.* The *Aguilar* Court analyzed *United States v. Prantil*, 764 F.2d 548 (9<sup>th</sup> Cir. 1985), in which the Ninth Circuit Court of Appeals held that the trial court abused its discretion in denying the defendant's motion for substitution of an alternative prosecutor, where the prosecutor was a testifying witness in the trial. *Aguilar*, 135 Idaho at 896. *Aguilar* acknowledged that the *Prantil* Court, in coming to that conclusion, determined that the prosecuting attorney was a witness to and a participant in, some aspect of all of the events alleged in the indictment. *Aguilar*, 135 Idaho at 896. *Aguilar*, however, found *Prantil* distinguishable. In so concluding, the Court determined that the prosecuting attorney was not a participant in or a witness to the acts or transaction upon which the defendant's prosecution was based. *Id.* Moreover, the Court of Appeals determined that the defendant had not shown a "compelling need" to call the prosecutor as a witness. *Id.* Unlike *Aguilar*, the

prosecuting attorney here witnessed a statement which was material to the event alleged in the indictment, namely Ms. Kallin witnessed whether S.T. told her S.T. saw Mr. Rodriguez masturbate. Mr. Rodriguez has shown a compelling need to call Ms. Kallin as a witness.

The State argues even if the prosecutor's question was improper, the defendant engaged in the same tactic when cross-examining S.T. (Respondent's Brief, pp.10-11.) The State alleges that while cross examining S.T., the defendant asked her whether she remembered telling Mrs. Perry, who was with the Nampa Family Justice Center, that S.T. never saw Mr. Rodriguez masturbate. *Id.* The State misstates Mr. Rodriguez's argument. Mr. Rodriguez's question was consistent with the testimony of S.T.; Ms. Kallin's testimony was inconsistent with S.T.'s testimony. Mr. Rodriguez's concern in this case is not the proposal of factual scenarios, but rather the proposal of factual scenarios inconsistent with the evidence presented at trial.

Another reason the State argues I.R.C.P. 3.7 is inapplicable is "because the prosecutor was not 'likely to be a necessary witness.'" (Respondent's Brief, p.8.) The State cites I.R.E. 613(b) as support, stating "prior statements may not be proved by extrinsic evidence." *Id.* I.R.E. 613(b) provides "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon...." Although it is not clear from their brief, this argument actually favors Mr. Rodriguez. The extrinsic evidence in this case is Ms. Kallin's testimony that S.T. said she saw Mr. Rodriguez masturbate. S.T. denied she said this.

Therefore, under the State's reading of 613(b), the testimony from Ms. Kallin cannot be used to prove prior statements, since it was extrinsic evidence.<sup>1</sup>

Lastly, the State argues that Mr. Rodriguez's I.R.C.P. 3.7 argument is inapplicable because the Supreme Court of the United States specifically rejected this sort of analysis in *Smith v. Phillips*, 455 U.S. 209 (1982).<sup>2</sup> (Respondent's Brief, p.8.) In *Smith*, the appellant argued that the prosecutor withheld the fact that a juror applied to be an investigator in the prosecutor's office. *Smith* 455 U.S. at 209. The court found no harm to the defendant because the analysis for prosecutorial misconduct is fairness of the trial, not conduct of the prosecutor. *Id.* at 219. In contrast, Mr. Rodriguez alleges prosecutorial misconduct, which impacted the fairness of his trial, not the conduct of the prosecutor. For instance, in Issue I, Mr. Rodriguez alleges his right to due process and right to a fair trial before an impartial jury and his right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitutions were violated. None of these issues focus on the "culpability of the prosecutor", but focus on how the prosecutor's misconduct resulted in various violations of Mr. Rodriguez's constitutional rights.

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<sup>1</sup> I.R.E. 613 (b) would bar Ms. Kallin from testifying what S.T. told her in an interview. S.T. denied she made the statement. However, Mr. Rodriguez was never given the opportunity to cross-examine Ms. Kallin regarding this statement. Mr. Rodriguez asserts this error violated his due process rights under the United States Constitution.

<sup>2</sup> The State cites *Smith v. Phillips*, 455 U.S. 940, 219 (1982). Mr. Rodriguez assumes this was a typographical error and intended to cite it as *Smith v. Phillips*, 455 U.S. 209 (1982).

D. The District Court Erred When It Failed To Give The Jury Any Limiting Instructions To Ensure The Unsworn Testimony Was Not Used For An Improper Purpose

The State claims “Mr. Rodriguez has cherry-picked the instructions to present a misleading argument.” (Respondent’s Brief, p.13.) In support of this conclusion, the State minimizes the effect of and actually ignores any prejudice the instructions had on Mr. Rodriguez’s ability to have a fair trial. Mr. Rodriguez, in his Appellant’s Brief, fleshed out the way in which Ms. Kallin’s misconduct effected the trial. First, the court told the jury that opening statements are not in evidence. (Tr., p.168, L.25 – p.169, L.1.) Second, immediately prior to opening statements, the Court told the jury “you must decide the case only on the evidence received in court.” (Tr., p.179, Ls.15-17.) In opening statements, Ms. Voss told the jury “you will also hear from the defendant’s other daughter, [S.T.] She’s 14 today. [S.T.] will talk to you about seeing her father masturbate in front of her.” (Tr., p.181, Ls.4-7.)

The State acknowledges that the district court instructed the jury that it was to base its verdict on the evidence, and that the statements of the lawyers were not in evidence. (Tr., p.349, L.13 – p.350, L.5.) However, the State ignores the fact when the district court gave that instruction to the jury, it was after all of the evidence was presented. That instruction was given after the State told the jury “S.T. will talk to you about seeing her father masturbate in front of her.” (Tr., p.181, Ls.4-7.) That instruction was given after S.T. denied seeing her father masturbate. That instruction was given after Ms. Kallin told the jury that S.T. said she saw her father masturbate. The State, in an attempt to show Mr. Rodriguez failed to show prejudice, argues “it did not ultimately rise to the level of denying Mr. Rodriguez’s due process right to a fair trial.”

(Respondent's Brief, p.12.) Based upon that conclusion, the State claims it would stand to reason that the jury would not have considered the unsworn testimony of Ms. Kallin in reaching their verdict. This, however, is not the case.

During deliberations, the jury returned with two questions, only one of which is relevant here. (Tr., p.371, L.6 - p.380, L.11.) Jurors asked, "Instruction 32: Is inducing, causing or permitting opportunity, To witness an act of sexual conduct, sufficient cause to establish guilt on point 3? That is to say, if we conclude the victim did not actually see any sexual conduct, is point 3 satisfied for finding of guilt?" (R., p.230 (emphasis in original).) The Court, with agreement of the parties, told the jury to answer the question by reading the instruction. (Tr., p.381, L.4 - p.382, L.5.) Instruction 32 deals specifically with the allegation of Sexual Abuse of a Child, S.T. The portion of the instruction the jury had a question about states: "3. the defendant Margarito Rodriguez induced, caused or permitted S.T. (D.O.B: 5/23/2000) to witness an act of sexual conduct." (R., p.217.) The State correctly acknowledged that to show error Mr. Rodriguez "would have to show that the jury ignored its instructions, considered the question as evidence, and rendered a different verdict than it would have based on other evidence, which included a video of the act in question."<sup>3</sup> (Respondent's Brief, p.13.) The State argues Mr. Rodriguez failed to make this showing.

S.T. testified she never saw Mr. Rodriguez masturbate. This testimony, if believed, would require the jury to acquit Mr. Rodriguez of the charge involving S.T. The

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<sup>3</sup> Mr. Rodriguez incorporates here his Appellant Brief argument regarding the video. Mr. Rodriguez will also address select issues raised by the State, regarding the video later in this brief.

jury's question reveals the jury considered the prosecutor's unsworn testimony in reaching its verdict.

E. Cross-Examining S.T. Does Not Cure The Violation Of Mr. Rodriguez's Due Process Rights, As S.T. Is Not The Witness Who Made The Statement

The State, in an effort to prove Mr. Rodriguez has failed to prove prejudice, argues that Mr. Rodriguez had ample opportunity to cross-examine S.T. (Respondent's Brief, p.12.) This argument does not address how the admission of Ms. Kallin's testimony prejudiced Mr. Rodriguez. Mr. Rodriguez's due process rights were violated when Ms. Kallin provided unsworn testimony, not subject to cross-examination. It is illogical for defense counsel to cross-examine S.T., as S.T. testified she never saw Mr. Rodriguez masturbate. Mr. Rodriguez's rights were violated when he was unable to cross examine Ms. Kallin, not S.T.

The State diminishes the effect the jury's question had on Mr. Rodriguez's due process rights. Specifically, the State sees no difference between the jury question "whether inducing, causing or permitting opportunity to witness" and the jury instruction which required that Mr. Rodriguez "induced, caused or permitted S.T. to witness an act of sexual conduct." (Respondent's Brief, pp.13-14.) Absent from the State's analysis is the presence of the word "opportunity". The state's argument is that "nothing in the question or answer indicated that the jury improperly considered the prosecutor's question to be evidence." (*Id.* at 14). This is not consistent with the evidence in the case. The only admissible testimony regarding this issue is from S.T., who said she never saw Mr. Rodriguez masturbate. Therefore, if the jury relied on the admissible testimony only, they would have returned a not guilty verdict on this count. The

prosecutor's unsworn testimony, coupled with the court's improper instructions, is the only way the jury could have convicted Mr. Rodriguez. The jury, by their question, arguably did not believe he induced, caused or permitted S.T. to witness an act of sexual conduct, but believed he only permitted the opportunity. Mr. Rodriguez's conviction was based on consideration of evidence other than S.T.'s testimony, specifically Ms. Kallin's testimony, as hers was the only testimony that S.T. told saw Mr. Rodriguez masturbate.

## II.

### The District Court Erred When It Allowed The Prosecutor To Testify In Violation Of Mr. Rodriguez's Rights Under The Confrontation Clause Of The Sixth Amendment To The United States Constitution

Mr. Rodriguez incorporates his argument in Section II of the Appellant's Brief here but Mr. Rodriguez will address directly the claims made in the State's response regarding Mr. Rodriguez's right under the Confrontation Clause of the Sixth Amendment to the United States Constitution. The State argues that the prosecutor's question was not an out-of-court testimonial statement, but rather an in-court question by counsel regarding an out-of-court statement by a witness on the stand. (Respondent's Brief, pp.9-10.) This is simply not the case. S.T. denied telling Ms. Kallin she saw her father masturbate. (Tr., p.230, L.25 – p.231, L.4.) Therefore, the statement that S.T. said she saw her father masturbate is attributed to Ms. Kallin, not S.T. Mr. Rodriguez's due process rights were violated because he didn't have an opportunity to cross examine Ms. Kallin. (Appellant's Brief, p.19.) Most importantly, the district court erred when it allowed Ms. Kallin to testify without being subject to cross-examination. Placing Ms. Kallin under oath, subject to cross examination, would have been the only way to



cure the prejudice once the court allowed her testify. Allowing Ms. Kallin to testify without cross-examination violated Mr. Rodriguez's constitutional rights. The error is clear on the record and Mr. Rodriguez was prejudiced as a result.

### III.

#### The District Court Erred When It Allowed The Prosecutor To Engage In Misconduct By Offering Facts Not In Evidence By Allowing The Detective To Give His Opinion About What He Saw On State's Exhibit 19, A Video<sup>4</sup>, To The Jury

Mr. Rodriguez incorporates his argument in Section III of his Appellant's Brief, but will address the claims made in the State's response, that the error did not rise to the level of fundamental error by relieving the State of proving its burden of whether Mr. Rodriguez was masturbating in front of S.T. (Appellant's Brief, p.23.) The State alleges Mr. Rodriguez has failed to show fundamental error in the limiting instruction and testimony regarding Exhibit 19. (Respondent's Brief, pp.15-19), and claims that Mr. Rodriguez's argument is specious. (Respondent's Brief, p.18.) To the contrary, considering only the admissible evidence would warrant an acquittal on this charge. The only way for the jury to find Mr. Rodriguez guilty was for it to consider evidence that was improperly admitted, specifically the detective's opinion about what he believed was on State's Exhibit 19, a video. S.T.'s testimony did not support the detective's narrative. Therefore, two of the most important factual determinations for the jury, whether the man in the video masturbated, and whether it was done in front of S.T., came from Ms. Kallin's unsworn testimony, which was affirmed by the detective's testimony stating

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<sup>4</sup> The State alleges that Exhibit 19 is not in the record on appeal and must be presumed to support the verdict. (Respondent's Brief, p.13 n.6.) Exhibit 19 was retained by Canyon County District Court as required by I.C.R. 16(m)(1) but it was included in the Certificate of Exhibits. (R., p.278.)

his opinion about the contents of the video. The only admissible evidence, S.T.'s testimony, would result in an acquittal. Thus, this relieved the state of proving each and every element of the offense, resulting in fundamental error.

#### IV.

The District Court Erred When It Made Improper Comments On The Evidence By Admonishing The Jury To Only Consider The Video (State's Exhibit 19) And The Detective's Narrative For The Charge Against Mr. Rodriguez Involving S.T., Thereby Violating Mr. Rodriguez's Right To A Fair Trial Before An Impartial Jury

The state oversimplifies and mischaracterizes Mr. Rodriguez's argument. (Respondent's Brief, pp.18-19.) In his Appellant's Brief, Mr. Rodriguez argues the district court made improper comments on the evidence when it admonished the jury to only consider the video and the narrative for the charge involving S.T., and these improper comments violated his right to a fair trial before an impartial jury. (Appellant Brief, pp.26-29.) The State mischaracterizes Mr. Rodriguez's argument as being "that the district court committed fundamental error by giving the instruction limiting the jury's consideration to the admissible components of Exhibit 19." (Respondent's Brief, pp.18-19.) The State's reframing of this argument is incorrect. Mr. Rodriguez maintains the district court erred when it allowed Detective Bryant to give his opinion, that the male in the video, State's Exhibit 19, was masturbating, which was an offer of facts not in evidence. By extension, Mr. Rodriguez maintains the district court also erred when it instructed the jury it could only consider the video and narrative for the charge involving S.T, because the court offered facts not in evidence. One argument focuses on Detective Bryant's narrative, while the other focuses on the court's improper comment on the evidence. The court's improper comment on the evidence relieved the State of its

burden of proving the person in the video was Mr. Rodriguez, that the other person in the video was S.T. The decision of whether it was Mr. Rodriguez or. S.T., and not someone else, was for the jury, not the court. Unlike the State's conclusion that "[n]o constitutional right was even implicated..." (Respondent's Brief, p.19.), this error violated Mr. Rodriguez's right to a fair trial before an impartial jury. Because the court offered an improper comment on the evidence, Mr. Rodriguez was not given a fair trial before an impartial jury.

### CONCLUSION

For the reasons explained above and in the Appellant's Brief, this Court should vacate Mr. Rodriguez's conviction relating to S.T. and remand to the district court for further proceedings.

DATED this 25<sup>th</sup> day of November, 2015.

  
AARON J. CURRIN  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25<sup>th</sup> day of November, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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CHRISTOPHER S NYE  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

ANDREW WOOLF  
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